

N.D.A.G. Letter to Thompson (July 5, 1989)

July 5, 1989

Honorable Vern Thompson
State Representative
P.O. Box 25
Minnewaukan, ND 58351

Dear Representative Thompson:

Thank you for your May 3, 1989, letter asking two questions concerning a city's ability to delegate the functions of a city officer or city governing body to another city officer.

Your first question is whether the city commissioners may delegate any of the functions or duties of the city auditor to a city coordinator.

N.D.C.C. § 40-16-03 lists the duties and responsibilities of a city auditor. N.D.C.C. § 40-16-16 authorizes a city commission to delegate any of a city auditor's functions and duties to an officer appointed pursuant to N.D.C.C. § 40-15-05. I assume that the city coordinator at issue here is an appointive office deemed necessary and established by the board of city commissioners pursuant to N.D.C.C. § 40-15-05(12). If the city coordinator position is appointed pursuant to N.D.C.C. § 40-15-05(12), N.D.C.C. § 40-16-16 authorizes a city commission to delegate any of the functions and duties of the city auditor to such an officer.

In two 1976 Attorney General's letter opinions this office concluded that N.D.C.C. § 40-16-16 allowed a governing body to delegate any function or duty of the city auditor to another officer duly appointed under N.D.C.C. §§ 40-14-04, 40-15-05. Letter from Assistant Attorney General Brady to Frank V. Jansky (February 4, 1976); Letter from Chief Deputy VandeWalle to Margaret Theis (June 1, 1976). In a 1973 Attorney General's letter opinion then Assistant Attorney General VandeWalle concluded that by the authority granted pursuant to N.D.C.C. § 40-16-16, "the city governing body could appoint some person to assume that portion of the city auditor's duties or any other of the city auditor's duties for that matter." Letter from Assistant Attorney General VandeWalle to D. G. Drummond (June 18, 1973).

It may be contended that this interpretation of N.D.C.C. §§ 40-16-16 conflicts with N.D.C.C. 40-13-11. N.D.C.C. § 40-13-11 states that all municipal officers' duties, powers, and privileges not defined in title 40 shall be defined by the governing body.

N.D.C.C. § 40-13-11 addresses two categories of municipal officers: municipal officers whose duties are not defined by title 40 and municipal officers whose duties are defined by title 40. For the first category of municipal officers (those whose duties are not defined by state law), the first sentence of N.D.C.C. § 40-13-11 states that the governing body

shall define the duties of such officers. For the second category of municipal officers (those whose duties are defined by title 40), the second sentence of N.D.C.C. § 40-13-11 allows a governing body to further define the duties of such officers and to provide additional duties to be performed by these officers.

A close review of N.D.C.C. § 40-13-11 reveals no provision prohibiting a city governing body from delegating the statutorily defined duties of a city officer, including a city auditor, to another city officer. For municipal officers whose duties are defined by state law, such as a city auditor, N.D.C.C. § 40-13-11 provides only that the city governing body may further define and add to the duties of such officers. More importantly, in the case of city auditor, N.D.C.C. § 40-16-16 specifically allows the city governing body to delegate city auditor duties to other municipal officers.

Accordingly, the interpretation of N.D.C.C. § 40-16-16 which has been maintained by this office since at least 1976 and which is based upon the clear and unambiguous terms of the statute does not conflict with N.D.C.C. 40-13-11. Therefore, it is my opinion that the board of city commissioners may, pursuant to N.D.C.C. § 40-16-16, delegate any function or duty of the city auditor to any other officer appointed pursuant to N.D.C.C. § 40-15-05. If a city coordinator is an officer duly appointed by the city commissioners pursuant to N.D.C.C. § 40-15-05(12), the city coordinator may be the recipient of duties and functions of the city auditor delegated to that officer by the board of city commissioners.

Your second question is whether the city commissioners of a non-home rule city may appoint a city manager and delegate to the city manager duties otherwise assigned by state law to the city commissioners or other municipal officers.

A city, as a political subdivision, has only those powers provided to it by law. N.D. Const. art. VII, § 2. A home rule city is authorized to provide for the structure and form of its government, including its governing body, executive officer, and city officers. N.D.C.C. § 40-05.1-06(4). However, the city of Bismarck is a home rule city only with respect to the imposition of a sales tax. See N.D.C.C. § 40-05.1-06(16). Thus, the home rule city powers found at N.D.C.C. § 40-05.1-06(4) currently are not available to the city of Bismarck and will not be considered in this analysis. Furthermore, the city of Bismarck has not adopted the city manager plan of government. See N.D.C.C. ch. 40-10.

Cities that are not entitled to home rule city powers are restricted to those powers generally applicable to cities. With respect to the structure of a city's governing body, executive officer, and other city officers, a non-home rule city must abide by state law and may not create its own unique form of government. Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980). Additionally, N.D.C.C. § 40-05-01(1) allows a non-home rule city to adopt ordinances, resolutions, and regulations which are "not repugnant to the constitution and laws of this state."

In commission cities the executive officer is the president of the board of city commissioners. N.D.C.C. §§ 40-01-01(2), 40-09-08. The governing body is the board of city commissioners. N.D.C.C. § 40-01-01(3). Each city commissioner is responsible for

the supervision of specified city departments. N.D.C.C. § 40-09-12. Finally, the board of city commissioners possesses "sole authority" to adopt whatever rules and regulations are needed concerning the organization, management, and operation of all city departments and agencies that have been created to administer city affairs. N.D.C.C. § 40-09-14.

There is no statutory authority provided to the governing body of a non-home rule city to assign or delegate those duties that the law assigns to the president of the board of city commissioners or the board of city commissioners. Therefore, an attempt by the board of city commissioners to assign or delegate statutory duties provided to the president of the board of city commissioners or to the board of city commissioners would be repugnant to the laws of the state. Such an attempt would be null and void. N.D.C.C. § 40-05-01(1); Litten v. City of Fargo.

The delegation of the duties of a city officer, other than the president of the board of city commissioners or the board of city commissioners, to an appointee of the city commission acting as a city manager is more difficult to analyze. The specific city officer involved must be identified before further analysis can proceed. There may be differing statutory provisions depending upon the identity of the city officer involved. As previously noted, the statutes discussing the city auditor specifically provide that any function or duty of that officer may be delegated to another officer. N.D.C.C. § 40-16-16.

In general, the provisions of N.D.C.C. § 40-15-05 may be applicable. The last sentence of this statute allows the board of city commissioners to dispense with any appointive office and to allow the duties of that office to be performed by other officers or boards, by the board of city commissioners, or by committee or committees thereof.

In summary, N.D.C.C. § 40-16-16 allows the board of city commissioners to delegate any function or duty of the city auditor to any other city officer who has been appointed pursuant to N.D.C.C. § 40-15-05. The position of city coordinator may be established by the city commissioners pursuant to N.D.C.C. § 40-15-05(12) when such officer is deemed necessary by the commissioners. When that position is created, the city coordinator may receive any function or duty of the city auditor or other officers listed at N.D.C.C. § 40-15-05. However, in non-home rule cities that have not adopted the city manager plan of government, the statutory duties and responsibilities provided to the president of the board of city commissioners and city commissioners may not be delegated to the city coordinator.

Several documents were attached to your request for an Attorney General's opinion generally describing the various job responsibilities and duties of the city coordinator of Bismarck. These documents have not been used in arriving at these legal conclusions as they were not needed to answer the questions of law posed in the opinion request. There may be factual questions concerning the various jobs and duties assigned to the city coordinator. An important factual question would be whether any statutory duty assigned to the executive officer or the governing body of the city of Bismarck has been assigned to the city coordinator. However, these are questions of fact rather than of law. Attorney General opinions are intended only to resolve questions of law.

I encourage the Bismarck city commissioners to work with the Bismarck city attorney in resolving any factual disputes remaining with this issue. I hope that this opinion will provide the Bismarck city attorney with the necessary legal guidance in resolving the questions of law. The factual questions will be resolved by applying the applicable legal principles to those facts surrounding the duties and responsibilities of the city coordinator.

Sincerely,

Nicholas J. Spaeth

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